

S.C. Code Ann. Section 58-41-20 (I)

SECTION 58-41-20. Review and approval proceedings for electrical utilities' avoided cost methodologies, standard offers, form contracts, and commitment to sell forms.

(A) As soon as is practicable after the effective date of this chapter, the commission shall open a docket for the purpose of establishing each electrical utility's standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement this section. Within six months after the effective date of this chapter, and at least once every twenty-four months thereafter, the commission shall approve each electrical utility's standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement this section. Within such proceeding the commission shall approve one or more standard form power purchase agreements for use for qualifying small power production facilities not eligible for the standard offer. Such power purchase agreements shall contain provisions, including, but not limited to, provisions for force majeure, indemnification, choice of venue, and confidentiality provisions and other such terms, but shall not be determinative of price or length of the power purchase agreement. The commission may approve multiple form power purchase agreements to accommodate various generation technologies and other project-specific characteristics. This provision shall not restrict the right of parties to enter into power purchase agreements with terms that differ from the commission-approved form(s). Any decisions by the commission shall be just and reasonable to the ratepayers of the electrical utility, in the public interest, consistent with PURPA and the Federal Energy Regulatory Commission's implementing regulations and orders, and nondiscriminatory to small power producers; and shall strive to reduce the risk placed on the using and consuming public.

(1) Proceedings conducted pursuant to this section shall be separate from the electrical utilities' annual fuel cost proceedings conducted pursuant to Section 58-27-865.

(2) Proceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing.

(B) In implementing this chapter, the commission shall treat small power producers on a fair and equal footing with electrical utility-owned resources by ensuring that:

(1) rates for the purchase of energy and capacity fully and accurately reflect the electrical utility's avoided costs;

(2) power purchase agreements, including terms and conditions, are commercially reasonable and consistent with regulations and orders promulgated by the Federal Energy Regulatory Commission implementing PURPA; and

(3) each electrical utility's avoided cost methodology fairly accounts for costs avoided by the electrical utility or incurred by the electrical utility, including, but not limited to, energy, capacity, and ancillary services provided by or consumed by small power producers including those utilizing energy storage equipment. Avoided cost methodologies approved by the commission may account for differences in costs avoided based on the geographic location and resource type of a small power producer's qualifying small power production facility.

(C) The avoided cost rates offered by an electrical utility to a small power producer not eligible for the standard offer must be calculated based on the avoided cost methodology most recently approved by the commission. In the event that a small power producer and an electrical utility are unable to mutually agree on an avoided cost rate, the small power producer shall have the right to have any disputed issues resolved by the commission in a formal complaint proceeding. The commission may require mediation prior to a formal complaint proceeding.

(D) A small power producer shall have the right to sell the output of its facility to the electrical utility at the avoided cost rates and pursuant to the power purchase agreement then in effect by delivering an executed notice of commitment to sell form to the electrical utility. The commission shall approve a standard notice of commitment to sell form to be used for this purpose that provides the small power producer a reasonable period of time from its submittal of the form to execute a power purchase agreement. In no event, however, shall the small power producer, as a condition of preserving the pricing and terms and conditions established by its submittal of an executed commitment to sell form to the electrical utility, be required to execute a power purchase agreement prior to receipt of a final interconnection agreement from the electrical utility.

(E)(1) Electrical utilities shall file with the commission power purchase agreements entered into pursuant to PURPA, resulting from voluntary negotiation of contracts between an electrical utility and a small power producer not eligible for the standard offer.

(2) The commission is authorized to open a generic docket for the purposes of creating programs for the competitive procurement of energy and capacity from renewable energy facilities by an electrical utility within the utility's balancing authority area if the commission determines such action to be in the public interest.

(3) In establishing standard offer and form contract power purchase agreements, the commission shall consider whether such power purchase agreements should prohibit any of the following:

(a) termination of the power purchase agreement, collection of damages from small power producers, or commencement of the term of a power purchase agreement prior to commercial operation, if delays in achieving commercial operation of the small power producer's facility are due to the electrical utility's interconnection delays; or

(b) the electrical utility reducing the price paid to the small power producer based on costs incurred by the electrical utility to respond to the intermittent nature of electrical generation by the small power producer.

(F)(1) Electrical utilities, subject to approval of the commission, shall offer to enter into fixed price power purchase agreements with small power producers for the purchase of energy and capacity at avoided cost, with commercially reasonable terms and a duration of ten years. The commission may also approve commercially reasonable fixed price power purchase agreements with a duration longer than ten years, which must contain additional terms, conditions, and/or rate structures as proposed by intervening parties and approved by the commission, including, but not limited to, a reduction in the contract price relative to the ten year avoided cost. Notwithstanding any other language to the contrary, the commission will make such a determination in proceedings conducted pursuant to subsection (A). The avoided cost rates applicable to fixed price power purchase agreements entered into pursuant to this item shall be based on the avoided cost rates and methodologies as determined by the commission pursuant to this section. The terms of this subsection apply only to those small power producers whose qualifying small power production facilities have active interconnection requests on file with the electrical utility prior to the effective date of this act. The commission may determine any other necessary terms and conditions deemed to be in the best interest of the ratepayers. This item is not intended, and shall not be construed, to abrogate small power producers' rights under PURPA that existed prior to the effective date of the act.

(2) Once an electrical utility has executed interconnection agreements and power purchase agreements with qualifying small power production facilities located in South Carolina with an aggregate nameplate capacity equal to twenty percent of the previous five-year average of the electrical utility's South Carolina retail peak load, that electrical utility shall offer to enter into fixed price power purchase agreements with small power producers for the purchase of energy and capacity at avoided cost, with the terms, conditions, rates, and terms of length for contracts as determined by the commission in a separate docket or in a proceeding conducted pursuant to subsection (A). The commission is expressly directed to consider the potential benefits of terms with a longer duration to promote the state's policy of encouraging renewable energy.

(G) Nothing in this section prohibits the commission from adopting various avoided cost methodologies or amending those methodologies in the public interest.

(H) Unless otherwise agreed to between the electrical utility and the small power producer, a power purchase agreement entered into pursuant to PURPA may not allow curtailment of qualifying facilities in any manner that is inconsistent with PURPA or implementing regulations and orders promulgated by the Federal Energy Regulatory Commission.

(I) The commission is authorized to employ, through contract or otherwise, third-party consultants and experts in carrying out its duties under this section, including, but not limited to, evaluating avoided cost rates, methodologies, terms, calculations, and conditions under this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of a third-party consultant or expert authorized by this subsection. The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section. The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified independent third party shall submit all requests for documents and information necessary to their analysis under the authority of the commission and the commission shall have full authority to compel response to the requests. The qualified independent third party's duty will be to the commission. Any conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility. The utilities may require confidentiality agreements with the independent third party that do not impede the third-party analysis. The utilities shall be responsive in providing all documents, information, and items necessary for the completion of the report. The independent third party shall also include in the report a statement assessing the level of cooperation received from

the utility during the development of the report and whether there were any material information requests that were not adequately fulfilled by the electrical utility. Any party to this proceeding shall be able to review the report including the confidential portions of the report upon entering into an appropriate confidentiality agreement. The commission and the Office of Regulatory Staff may not hire the same third-party consultant or expert in the same proceeding or to address the same or similar issues in different proceedings.

(J) Each electrical utility's avoided cost filing must be reasonably transparent so that underlying assumptions, data, and results can be independently reviewed and verified by the parties and the commission. The commission may approve any confidentiality protections necessary to allow for independent review and verification of the avoided cost filing.

HISTORY: 2019 Act No. 62 (H.3659), Section 1, eff May 16, 2019.

Editor's Note

2019 Act No. 62, Section 14, provides as follows:

"SECTION 14. The provisions of Section 58-41-20 shall not be interpreted to supersede the conditions of any settlement entered into by an electrical utility and filed with the commission prior to the adoption of this act."

LEGEND:

Duke Energy Progress, LLC and Duke Energy Carolinas, LLC and Dominion Energy South Carolina, Inc.

Johnson Development Associates, Incorporated and the South Carolina Solar Business Alliance, Incorporated

F. Role of Qualified, Independent Third-Party Consultants or Experts Necessary to Effectuate Section 58-41-20(I) of the "S.C. Energy Freedom Act" (Also Referred to as Act 62)

1. Commissioners and Commission Employees are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. The qualified, independent third-party consultant or expert is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified, independent third-party consultant or expert shall submit all requests for documents and information necessary to conduct its analysis under the authority of the Commission, and the Commission shall have full authority to compel responses from parties to the request. The qualified, independent third-party consultant or expert's duty will be to the Commission.

2. The qualified, independent third-party consultant or expert is prohibited from furnishing, augmenting, diminishing, or modifying the evidence in the record, pursuant to S.C. Code Ann. Section 58-3-260(C)(8)(b).

3. All communications between any party and the qualified, independent third-party consultant or expert must be communicated to all parties contemporaneous with the original communication.

4. Upon retention by the Commission, the qualified, independent third-party consultant or expert shall sign an acknowledgement of the ex parte prohibitions in Chapter 3, Title 58.

5. The qualified, independent third-party consultant or expert shall submit a proposed procedural schedule for the timing of the development and issuance of its report and its intended approach to complying with the ex parte prohibition provisions in carrying out its responsibilities to the Commission.

G. Procedure for Effectuating S.C. Code Ann. Section 58-41-20(I)

The qualified, independent third-party consultant or expert:

1. Shall notify the parties to a proceeding of any recommendations or conclusions made by the qualified, independent third-party consultant or expert and provide a reasonable explanation of the bases for such recommendations or conclusions;

2. May be deposed by any party pursuant to S. C. Code Ann. Regs. 103-834;

3. May be called to testify by the Commission or any party;

4. May be cross-examined by any party, including the party that called the qualified, independent third-party consultant or expert to testify; and

5. May be required to respond to Written Interrogatories and Requests for Production of Documents and Things pursuant to S. C. Code Ann. Regs. 103-833.

1. The qualified, independent third-party consultant or expert is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as Commissioners and Commission Employees. The qualified, independent third-party consultant or expert shall submit all requests for documents and information necessary to conduct its analysis under the authority of the Commission, and the Commission shall have full authority to compel responses from parties to the request. The qualified, independent third-party consultant or expert's duty will be to the Commission. No communications between the expert and any party regarding an issue before the Commission should be communicated without notice to all parties to the proceeding.

2. All communications between any party and the qualified, independent third-party consultant or expert must be communicated to all parties contemporaneous with the original communication.

3. Upon retention by the Commission, the qualified, independent third-party consultant or expert shall sign an acknowledgement of the ex parte prohibitions in Chapter 3, Title 58.

4. The qualified, independent third-party consultant or expert shall submit a proposed procedural schedule for the timing of the development and issuance of its report and its intended approach to complying with the ex parte prohibition provisions in carrying out its responsibilities to the Commission.

5. The role of the qualified, independent third-party consultant or expert's duty is to advise the Commission and their role includes modeling its own data inputs and calculations via an independent analysis of an electrical utility's avoided cost. The role of the qualified, independent third-party consultant or expert is not to rely solely on inputs from the utility so as to be constrained to working from the utility's avoided cost data, inputs, and assumptions.

6. All parties shall receive the final report at least ten (10) days prior to the Commission's vote in the proceeding and must be given a reasonable opportunity to respond in writing to the final report prior to the Commission's vote in the proceeding.

7. The Final Report shall be included in the record and considered evidence along with all other

evidence in the proceeding, and given the appropriate value as each Commissioner does with any evidence in the record.